

REQUIRING ADMINISTRATIVE EXHAUSTION WHILE THE SCHOOL SHUTS DOWN: AN INSURMOUNTABLE BARRIER TO SEEKING IDEA ENFORCEMENT

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ABSTRACT

School districts are increasingly relying upon closing school buildings as a result of the current national education-funding crisis. With a significant portion of students in the American public education system falling under the protection of the Individuals with Disabilities Education Act (IDEA), districts must give proper attention to the IDEA's strict requirements when closing school buildings. Yet, parents currently have no adequate remedy to ensure IDEA enforcement during the short timeframe before a school closes. Parents face the insurmountable obstacle of having to first exhaust the IDEA administrative remedies prior to bringing a court action to temporarily delay a district from closing a school. Without first engaging the administrative remedies process, courts summarily dismiss parents' IDEA claims for lack of jurisdiction based on a want of administrative exhaustion.

By finding that the justifications for mandatory administrative exhaustion are lacking in the context of an imminent school closing and examining other situations in which courts waive the exhaustion requirement, it becomes evident that the time-sensitive nature of a looming school closing makes compulsory administrative exhaustion inapplicable. Congress is expected to reauthorize the IDEA, which presents an ideal opportunity for it to remedy the current administrative exhaustion barrier. This can be achieved by providing courts with the jurisdiction to hear disputes from either party after an IDEA administrative hearing and by waiving mandatory administrative exhaustion for civil cases seeking a preliminary injunction to temporarily prevent an imminent school closing due to an alleged IDEA violation.

These changes will allow parents to timely argue the merits of their IDEA-related preliminary injunction claim, rather than spending the limited time before a school closes first litigating

whether a court has jurisdiction to enforce a hearing officer's order or whether administrative exhaustion is appropriate. The time is now to take these steps to ensure that every student covered by the IDEA gets the required protection if—and, for many students in the United States, when—their school is slated to close.

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INTRODUCTION

Chicago Public Schools, the nation's third largest school district,¹ made national headlines when it announced that it was closing forty-nine school buildings prior to the start of the 2013–2014 academic year.² Resulting in a \$1 billion budget deficit,³ the district faces a period of decreasing revenues, declining student enrollment, and rising operating costs.⁴ Parents of students with disabilities filed a lawsuit against the district alleging that the expedited timeline to close the schools did not permit a proper evaluation of the students' individualized education plans or the district to properly accommodate the students' needs in their new school building.⁵ The parents sought to temporarily enjoin the district from closing the schools until the district put adequate attention into the students' educational accommodations as required under the Individuals with Disabilities Education Act (IDEA).⁶

Over a mere three-month period, the parents and the district engaged in a rapid, and very public, hearing in the Northern District of Illinois where the court ultimately rejected the motion for a

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1. Steven Yaccino, *Protests Fail to Deter Chicago from Shutting 49 Schools*, N.Y. TIMES (May 22, 2013), http://www.nytimes.com/2013/05/23/education/despite-protests-chicago-closing-schools.html?_r=0.

2. See, e.g., *id.*; Lorraine Forte, *School Closings Pose Big Challenge for Chicago Public Schools*, HUFFINGTON POST (Apr. 25, 2013, 5:27 PM), http://www.huffingtonpost.com/lorraine-forte/chicago-school-closings_b_3149471.html; Mary Wisniewski, *Chicago Board Approves Largest School Closing*, REUTERS (May 22, 2013, 7:36 PM), <http://www.reuters.com/article/2013/05/22/us-usa-education-chicago-vote-idUSBRE94L15P20130522>.

3. See Yaccino, *supra* note 1.

4. *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *1 (N.D. Ill. Aug. 15, 2013).

5. Complaint ¶ 1, *Swan*, 2013 WL 4401439 (No. 13-cv-03623) (stating that the parents claimed that the district's school-closing timeline would significantly disrupt the more than 5,000 students in the district's special education program).

6. *Id.* at 16.

preliminary injunction.⁷ Despite the arguments about the underlying merits of the parents' claim, Chicago Public Schools (CPS) skillfully prevailed in part because of the parents' procedural overstep.⁸ The parents failed to first exhaust the administrative remedies under the IDEA prior to bringing the civil action, resulting in the court's unequivocal rejection of their claim.⁹

The financial crisis facing CPS is not unique among public schools across the United States.¹⁰ The cause of this financial deterioration is complex, yet has undisputable causal factors ranging from the ways in which districts are funded to districts facing declining student enrollment.¹¹ Regardless of the roots of the financial turmoil, many districts across the nation are turning to closing school buildings as a result of these economic strains in order to maintain a balanced budget or to alleviate budget deficits.¹² The challenge that this situation creates is that the requirements of the IDEA do not fade due to budget woes.¹³ With a significant portion of students in the American public education system falling under the protection of the IDEA,¹⁴ districts must give proper attention to the IDEA's requirements when closing school buildings.¹⁵ The combination of the widespread school closings and strict federal protections for students with disabilities brings to light a seemingly minor, yet inexplicitly significant, requirement: Parents currently must take the time to exhaust the IDEA's administrative remedies prior to bringing a court action to temporarily stop a district from closing a school.¹⁶

7. *Swan*, 2013 WL 4401439, at *29.

8. *See id.* at *27-28. The court noted, however, that the parents were unlikely to prevail on the underlying merits of the claim. *See infra* note 280 and accompanying text.

9. *See infra* note 280 and accompanying text; *Swan*, 2013 WL 4401439, at *19.

10. *See infra* note 56 (providing examples of education-funding crises throughout the United States).

11. *See infra* Section I.A.

12. *See infra* Section I.A.

13. *See Swan*, 2013 WL 4401439, at *1-2, *28 (requiring the district to comply with the IDEA requirements despite a \$1 billion deficit).

14. *See infra* Section I.B.

15. *See Swan*, 2013 WL 4401439, at *1, *28 (requiring the district to comply with the IDEA requirements despite closing forty-nine schools within a single academic year).

16. *See id.* at *19 (holding that the plaintiffs cannot prevail on their claim because they did not first exhaust the administrative remedies).

This Note discusses how parents seeking to temporarily prevent a school from closing due to an alleged IDEA violation face an insurmountable obstacle by being required to first exhaust the administrative remedies.¹⁷ The flaw in this approach is that it is based on the presupposition that such an administrative remedy exists and that a district will adequately comply with an administrative hearing officer's order.¹⁸ The hearing officer does not, however, have the power to grant a preliminary injunction to prevent a school from closing.¹⁹ Moreover, a parent is prevented from bringing a civil action to ensure district compliance with an administrative order due to the court's lack of jurisdiction as dictated by the IDEA.²⁰ While much has been written on the IDEA exhaustion requirement in general,²¹ there is currently a void in legal scholarship addressing the exhaustion requirement as it relates specifically to imminent school closings and the IDEA. This Note does not argue that parents assumedly have a valid claim for a preliminary injunction; rather, it argues that the time-sensitive nature of a looming school closing should allow a parent to forego administrative exhaustion and bring an action for a preliminary injunction directly to the courts to adjudicate the underlying merits of the claim.

Part I examines the status of education funding in the United States as the driving force behind districts closing schools and provides an overview of the IDEA and its requirements relating to

17. See 20 U.S.C. § 1415(l) (2012) (stating that before a party can bring a civil action, administrative remedies generally must be exhausted).

18. See *infra* Part III.

19. See *infra* Subsection I.B.1 (providing an overview of the powers of an administrative hearing officer).

20. See *infra* Section I.B (discussing how courts strictly read the IDEA's jurisdictional-giving language).

21. See, e.g., Susan G. Clark, *Administrative Remedy Under IDEA: Must It Be Exhausting?*, 163 EDUC. L. REP. 1 (2002) (examining the established conditions for requiring the exhaustion of administrative remedies and instances in which the requirement is waived); Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009) (examining the implications of failing to exhaust administrative remedies, when exhaustion is required and when it is waived, and the diverging approaches to applying the IDEA's jurisdictional-giving language); Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259 (2011) (providing an overview of the IDEA's exhaustion requirement and its application to Section 504 of the Rehabilitation Act and the Americans with Disabilities Act).

administrative exhaustion. Part II discusses how courts approach the exhaustion requirement, both in the context of school closings and in general. Part III analyzes the challenges that imposing the administrative-exhaustion requirement presents to families in the context of school closings and proposes two changes to the IDEA that attempt to resolve these complications.

I. COMBINING CONSTRAINTS ON DISTRICTS: FINANCES AND THE IDEA

Public school districts across the United States face a myriad of challenges in providing adequate educational services.²² Two of these challenges are school district funding and the statutory requirements of the IDEA. The educational funding system based on state tax revenue places district finances at the mercy of the overall health of the economy.²³ Despite many districts making drastic budget cuts in the face of limited financial resources, they still must comply with the IDEA mandates.²⁴ The IDEA provides a comprehensive framework for districts to follow to ensure that adequate educational services are provided to qualifying students and for an administrative hearing process for addressing disputes regarding IDEA compliance.²⁵ While the current underfunded K-12 education system can lead districts to close one or more schools, the strict requirements of the IDEA leave parents with limited options to

22. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, J., concurring) (“I hope and believe that we are all mindful of the challenges school administrators face in providing a safe environment, conducive to learning and civic development, for children and young adults. Those challenges have never been greater than they are today.”); *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 268 (3d Cir. 2002) (“We recognize the challenges faced by school officials when attempting to adopt disciplinary policies directed at racial harassment.”); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924-25 (6th Cir. 1988) (“Today’s public schools face severe challenges in maintaining the order and discipline necessary for the impartation of knowledge.”); *AFT Mich. v. State*, 825 N.W.2d 595, 609 (Mich. Ct. App. 2012) (“We are not unmindful of the budgetary challenges facing local school districts . . .”).

23. See *infra* Section I.A (discussing how district funding is largely tied to state tax revenue).

24. See *infra* Section I.B (providing an overview of the strict requirements of the IDEA).

25. See *infra* Section I.B.

ensure that the district complies with a student's educational rights during the school-closing process.²⁶

A. Insufficient Educational Funding and Its Dire Consequences for School Districts

Public schools are the anchors of their respective communities.²⁷ But, as a result of the funding crisis facing many school districts across the nation,²⁸ districts²⁹ are increasingly forced to make painful budget cuts year after year.³⁰ School boards have little choice but to take drastic measures—from laying off teachers, administrators, and staff to closing entire school buildings³¹—to ensure that the district's doors remain open. The federal government has stepped in on multiple occasions to provide districts with billions of dollars in emergency funding to ward off looming budget cuts.³²

26. See *infra* Part II (discussing the limited avenues through which a parent can seek to enforce the IDEA protections).

27. See Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan as a Case Study*, 45 URB. LAW. 1, 19 (2013).

28. See Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 895 (2011) (“As school districts across the country continue to face falling revenues, they are scrambling to cut their budgets and adjust to leaner times. But districts have never had to make such drastic adjustments—and some of them are nearing a point of fiscal crisis.”).

29. Throughout this Note, the term “district” is used to indicate an entire K-12 public school district, whereas the term “school” represents a single school building within a district.

30. See Bowman, *supra* note 28, at 898-99 (discussing the various ways in which districts cut expenses from their budgets).

31. See *id.*

32. See Press Release, U.S. Dep’t of Educ., Congress Passes Bill to Provide \$10 Billion to Support 160,000 Education Jobs Nationwide (Aug. 10, 2010), <http://www.ed.gov/news/press-releases/congress-passes-bill-provide-10-billion-support-160000-education-jobs-nationwide> (announcing that President Barack Obama signed into law the Education Jobs Law in 2010 that provided \$10 billion “to support an estimated 160,000 education jobs nationwide”); Press Release, U.S. Dep’t of Educ., The American Recovery and Reinvestment Act of 2009: Saving and Creating Jobs and Reforming Education (Mar. 7, 2009), <http://www2.ed.gov/policy/gen/leg/recovery/implementation.html> (providing information on the American Recovery and Reinvestment Act of 2009, which provided \$100 billion to schools across the nation).

Those emergency funds have long since been depleted,³³ and districts are largely left to independently brave the financial storm.³⁴

While there is an array of causes that contributed to and continue to sustain the funding crisis in districts throughout the United States, leaders in educational academia generally point toward a certain direction when determining the overarching cause—the state and local tax system.³⁵ School districts, on average among all fifty states, rely on state and local government for 87.5% of their overall funding, which amounts to roughly \$528.8 billion nationally from state and local taxes.³⁶ While there is not a uniform national formula for funding schools, there is a general structure: The state portion of funding, which is estimated to be 44.1% of a district's total revenue,³⁷ is primarily drawn from income and sales taxes,³⁸ and the local portion of funding, which is estimated to be 43.4% of a district's total revenue,³⁹ is primarily drawn from property taxes, from both residential and commercial properties.⁴⁰ With public education funding being almost exclusively at the mercy of income, sales, and property taxes, districts face severe budget restrictions when the overall economy plummets,⁴¹ as the nation faced in the recent Great Recession.⁴²

Despite the official end of the recession, the national and state economies have hardly recovered—slow economic growth and high

33. See Bowman, *supra* note 28, at 895 (stating in a 2011 article that the additional federal education funds are soon to run out).

34. See *id.* at 899 (“Congress intended the stimulus money to stretch over two years, but most states used the vast majority of those funds during Fiscal Year (FY) 2010.”).

35. See, e.g., *id.* at 903; Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy*, 37 HOFSTRA L. REV. 117, 120, 146 (2008).

36. STEPHEN Q. CORNMAN, NAT'L CTR. FOR EDUC. STATISTICS, NCES 2013-342, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2010–11 (FISCAL YEAR 2011) 3 (2013), available at <http://nces.ed.gov/pubs2013/2013342.pdf>.

37. *Id.* at 8.

38. See *Federal, State, and Local K-12 School Finance Overview*, FED. EDUC. BUDGET PROJECT (June 30, 2013, 7:25 PM), <http://febp.newamerica.net/background-analysis/school-finance>.

39. CORNMAN, *supra* note 36, at 8.

40. See *Federal, State, and Local K-12 School Finance Overview*, *supra* note 38.

41. See Bowman, *supra* note 28, at 908.

42. See Chris Isidore, *It's Official: Recession Since Dec. '07*, CNN MONEY (Dec. 1, 2008, 5:40 PM), <http://money.cnn.com/2008/12/01/news/economy/recession>.

unemployment still taint the American economy.⁴³ Job loss and continued unemployment contribute to decreased and stagnated state income tax revenue.⁴⁴ The combination of decreased home values and the prevalence of foreclosures lead to low property tax revenue,⁴⁵ and low consumer spending results in low sales tax revenue.⁴⁶ This combination led to the perfect storm for the fiscal crisis currently facing many districts across the nation.⁴⁷ While some state budgets appear to be increasing revenues from their recession-era levels,⁴⁸ this fact does not inevitably equate to an improved outlook for districts.⁴⁹ Even while the American economy starts to turn around, it may be more than a decade before tax revenues return to their pre-

43. See Michael Sivy, *What the Current Economic Outlook Means for American Families*, TIME (Jan. 16, 2013), <http://business.time.com/2013/01/16/what-the-current-economic-outlook-means-for-american-families>.

44. See Bowman, *supra* note 28, at 903 (“These reductions have many causes, but the most immediate causes are that states’ income tax revenue has been hit hard by job losses; local and state property tax revenue has fallen sharply because home values have been dropping as the real estate bubble burst and tax delinquencies and home foreclosures rose; and state sales tax revenues have decreased because of substantial drops in consumer spending.”).

45. See *id.*

46. See *id.*

47. See *id.* at 908 (stating that “[t]he general economic crisis clearly is the dominant, immediate trigger of most school districts’ current fiscal crises”).

48. There are indications that state tax revenues are starting to turn a corner in some states. In Michigan, for example, lawmakers are grappling with how to appropriate a \$1.3 billion surplus; while some advocate using the funds to increase K-12 school district funding, others argue that the increase may not be sustainable long term. See Niraj Chokshi, *Michigan Session Preview: What to Do with \$1.3 Billion Surplus?*, WASH. POST (Jan. 14, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/01/14/michigan-session-preview-what-to-do-with-a-1-3-billion-surplus/>; Zoe Clark & Rick Pluta, *Michigan’s Budget Surplus: More Money, More Problems? Sure, but It Beats the Alternative*, MICH. RADIO (Jan. 3, 2014, 1:35 PM), <http://michiganradio.org/post/michigan-s-budget-surplus-more-money-more-problems-sure-it-beats-alternative>. Michigan Governor Rick Snyder announced on February 3, 2014 that his proposed 2014–2015 budget will increase K-12 school district funding by \$322 million, though \$270 million of that amount is designated to offset the increase in school retirement costs. See Paul Egan, *Snyder to Propose \$322-Million Funding Boost for K-12 Education*, DETROIT FREE PRESS (Feb. 3, 2014, 10:16 AM), <http://www.freep.com/article/20140203/NEWS06/302030053/Snyder-education-funding-increase-Michigan>.

49. See DIANE STARK RENTNER & NANCY KOBER, CTR. ON EDUC. POLICY, AFTER THE STIMULUS MONEY ENDS: THE STATUS OF STATE K-12 EDUCATION FUNDING AND REFORMS 1 (2012), available at http://www.cep-dc.org/cfcontent_file.cfm?Attachment=RentnerKober%5FReport%5FAfterStimulus%5F020612%2Epdf.

recession levels.⁵⁰ School districts continue, and will likely continue in the foreseeable future, to face a grim financial outlook.⁵¹

The restricting budgets facing districts across the nation are leading many schools to close their doors.⁵² Michigan's educational landscape, for example, is in a bleak position with a historic fifty-six school districts with budget deficits.⁵³ In Illinois, forty-five districts are classified as "highest risk" by its State Board of Education because of their severe financial status.⁵⁴ These are just two examples of the many districts facing financial turmoil across the nation.⁵⁵ Many districts are resorting to closing school buildings to help alleviate the financial strains⁵⁶—closing a school results in cost savings by eliminating redundant administrative, custodial, and food-service staff, and reducing costs associated with utilities,

50. Bowman, *supra* note 28, at 900 (stating that "it could take 15 years or more for tax revenue to rebound to pre-recession levels" (quoting Nick Bunkley, *Debt Rising, A City Seeks Donations in Michigan*, N.Y. TIMES, Nov. 20, 2010, at A10)).

51. *See id.*

52. *See supra* notes 30-34; *see also* EDWARD McMILIN, NAT'L CLEARINGHOUSE FOR EDUC. FACILITIES, CLOSING A SCHOOL BUILDING: A SYSTEMATIC APPROACH 1-2 (2010), available at <http://www.ncef.org/pubs/closing.pdf> ("[S]chool districts around the nation have announced major school closings. . . . Decreased revenues from taxes, fees, and reduced federal funding, less return on investments, and increased cost to continue services, have resulted in significant budget deficits. As a result, government units at all levels are being forced to reduce funding for education.").

53. *See* Brian Smith, *See the 56 Michigan School Districts with Budget Deficits*, MLIVE (Sept. 13, 2013, 9:19 AM), http://www.mlive.com/education/index.ssf/2013/09/see_the_56_school_districts_wi.html.

54. *See 2013 School District Financial Profile*, ILL. ST. BOARD EDUC., <http://www.isbe.state.il.us/sfms/p/profile.htm> (last visited Oct. 22, 2014).

55. Florida has fifty-eight public charter schools facing financial deficits. *See* FLA. AUDITOR GEN., REPORT ON SIGNIFICANT FINANCIAL TRENDS AND FINDINGS IDENTIFIED IN CHARTER SCHOOL AND CHARTER TECHNICAL CAREER CENTER 2011-12 FISCAL YEAR AUDIT REPORTS 1 (2013), available at http://www.myflorida.com/audgen/pages/pdf_files/2014-002.pdf. Philadelphia School District faces a \$304 million deficit, resulting in the layoff of 20% of the district's staff. *See* Suzi Parker, *Bankrupt in Philadelphia: Could This Happen to Your School District?*, TAKEPART (July 8, 2013), <http://www.takepart.com/article/2013/07/08/philadelphia-school-district-financial-crisis>; *see also infra* note 56.

56. *See* Bowman, *supra* note 28, at 898; *see also* Kayla Webley, *Are School Closings Discriminatory?*, TIME (May 23, 2013), <http://nation.time.com/2013/05/23/are-school-closings-discriminatory> (stating that New York City is slated to close seventeen of its schools, Philadelphia district officials announced that twenty-three schools are closings, and Washington D.C. is closing fifteen schools).

maintenance, and supplies.⁵⁷ A total of 1,929 schools closed in the United States during the 2010–2011 school year, up from 1,515 school closings in 2008–2009.⁵⁸ While scholars continue to debate the influence that educational funding has on student achievement,⁵⁹ the fact remains that schools cannot keep the proverbial schoolhouse gates open without adequate funding.⁶⁰ Always looming in the background for districts is the fact that shrinking budgets result in fewer available financial resources to ensure compliance with the demanding IDEA.

B. The IDEA's Strict Requirements

The IDEA⁶¹ is the cornerstone to ensuring that students with disabilities receive the necessary services to allow them to benefit from educational instruction provided by districts.⁶² In the latest national data collected by the National Center for Education Statistics, 13.1% of students in the United States school system,

57. See McMILIN, *supra* note 52, at 3 (“Most of the savings result from non-classroom personnel costs which would no longer be required. Generally these positions include principals, assistant principals, clerical staff, food service, and custodial personnel. Teaching staff is usually not included because the impact district-wide is based on collective bargaining agreements, retirements, and personnel who annually leave the district. . . . In addition to any personnel savings, budget reductions will result from reduced utility cost (60% factor), infrastructure maintenance cost (90% factor), budgeted capital maintenance projects, reduced rubbish and shredding costs, and all supplies.”).

58. THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, NCES 2014-015, DIGEST OF EDUCATION STATISTICS 2012, at 176 (2013), available at <http://nces.ed.gov/pubs2014/2014015.pdf>. Out of the 1,929 schools that closed during the 2010–2011 school year, 1,486 were traditional schools, 72 were special education schools, 7 were vocational schools, and 364 were alternative schools. *Id.*

59. See, e.g., BRUCE BAKER, ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 1-3 (2012), available at http://www.shankerinstitute.org/images/doesmoneymatter_final.pdf; MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 47-49 (2010); MICHAEL A. REBELL & JOSEPH J. WARDENSKI, CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 5-8 (2004), available at http://www.schoolfunding.info/resource_center/research/MoneyMattersFeb2004.pdf.

60. See *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *1-2 (N.D. Ill. Aug. 15, 2013) (noting the closing of forty-nine schools as a result of a \$1 billion budget deficit).

61. 20 U.S.C. §§ 1400-50 (2012).

62. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) (discussing the IDEA’s statutory requirements).

which equates to roughly 6,480,540 students, fall under the protection of the IDEA.⁶³ Students who are eligible to receive the benefits of the IDEA⁶⁴ are entitled to a free and appropriate public education, which the Supreme Court defines as consisting of specially created educational instruction to meet the unique needs of students with disabilities.⁶⁵ The provision of a free and appropriate public education is generally met when individualized instruction is provided along with supportive services, which can include, for example, extended time on tests or specialized equipment, such as a therapeutic chair, that allow a student to benefit from instruction.⁶⁶ In order for students to receive these specialized services, the district, along with the parents, is charged with creating an Individualized Education Plan (IEP) for the child.⁶⁷ The IEP establishes the student's educational goals, the necessary special education services that the child will receive, and the ways in which the goals and services will be evaluated.⁶⁸ There are a number of procedural safeguards that the IDEA provides parents to help ensure that districts continuously comply with both the IEP and its obligation to provide the eligible student with a free and appropriate public education.⁶⁹

63. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, NCES 2012-001, DIGEST OF EDUCATION STATISTICS 2011, at 87 (2012), available at <http://nces.ed.gov/pubs2012/2012001.pdf>.

64. Eligibility is defined by 20 U.S.C. § 1401(3)(A)(i) (2012) and 34 C.F.R. § 300.7(c)(1)-(13) (2003). For a detailed overview of the process through which a student is deemed eligible under the IDEA, see Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 451 (2004).

65. See *Rowley*, 458 U.S. at 188-89 (defining a free and appropriate public education as "educational instruction specially designed to meet the unique needs of the handicapped child").

66. See *id.* at 189 ("[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the [IDEA].").

67. See Garda, *supra* note 64, at 444-45.

68. See *id.* at 445 (citing 20 U.S.C. § 1414(d); 34 C.F.R. § 300.347).

69. See 20 U.S.C. § 1415(b)(1) (enumerating the procedural safeguards to include an opportunity for the parents "to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child").

1. *The Administrative Hearing Process*

The essential device for resolving IDEA disputes between districts and parents is an impartial administrative hearing.⁷⁰ These hearing proceedings, which are conducted by a hearing officer,⁷¹ can come in one of two forms depending on the selection of the individual state.⁷² A state can select either a one-tiered system in which a single hearing takes place to adjudicate the dispute, or a two-tiered system that includes the initial hearing, but that also provides an additional level of review.⁷³ The scope of the hearing officer's authority is generally limited to determining the sufficiency of a student's disability classification and the implementation of the IDEA, and to ordering districts to take corrective action to come into compliance with the Act.⁷⁴ If an administrative hearing is successful, then it promotes judicial efficiency by preventing unnecessary judicial intervention.⁷⁵ The hearing avoids immediate court action based on the speculative premise that district officials will correct any problems identified through the hearing.⁷⁶

The hearing process generally mirrors the procedural and adversarial nature of an action in civil court, resulting in an elongated trial-like process.⁷⁷ The IDEA enumerates strict procedural requirements, including the mandatory content within a parent's initial complaint⁷⁸ and within the district's response to the parent,⁷⁹

70. See Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 2-3 (2011) (citing 20 U.S.C. § 1415(b)(6)).

71. See *id.* at 3 (citing 20 U.S.C. § 1415(f)-(g)).

72. See *id.* ("The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional officer level review.").

73. See *id.*

74. See *id.* at 9 (providing an overview of the specific powers of a hearing officer).

75. See Clark, *supra* note 21, at 4.

76. See *id.*

77. See Andria B. Saia, *Special Education Due Process Hearings*, 79 PA. B. ASS'N Q. 1, 2 (2008).

78. 20 U.S.C. § 1415(b)(7)(A)(ii)(I)-(IV) (stating that the complaint shall include "the name of the child, the address of the residence[s] of the child (or available contact information in the case of a homeless child), . . . the name of the school the child is attending," a "description of the nature of the problem of the child relat[ed] to such proposed initiation or change, including facts relating to such [a] problem," and "a proposed resolution of the problem to the extent known and available to the party at the time"). The Act also requires each "[s]tate educational

standards through which the complaint can be amended,⁸⁰ and an initial determination by the hearing officer of whether these procedural requirements have been met.⁸¹ After a mandatory initial meeting between the parents and the district,⁸² the administrative hearing itself will commence, during which both parties have the right to, among other things, be represented by counsel, present evidence, compel the attendance of witnesses, and cross-examine witnesses.⁸³ These intricate requirements can, however, “be time-consuming and elaborate,” resulting in parties attempting to sidestep the requirements by taking action in civil court.⁸⁴ Nevertheless, before parents or district officials can bring a dispute to civil court for resolution, compliance with these administrative procedures is largely required under the IDEA; a court is likely to dismiss a related civil claim if the administrative remedy process is not first exhausted.⁸⁵

2. Seeking a Review of the Hearing Officer's Decision

Once an order is issued by an administrative hearing officer, there are strict statutory limitations on how to proceed with a subsequent dispute regarding compliance.⁸⁶ The IDEA provides that “any party aggrieved by the findings and decision rendered in such a hearing may appeal” its findings.⁸⁷ In two-tiered systems, the party

agency to develop a model form to assist parents in filing a complaint and due process complaint notice.” *Id.* § 1415(b)(8).

79. *Id.* § 1415(c)(2)(B)(i)(I)(aa)-(dd) (stating that the district’s response must be provided within ten days of receiving the complaint and it must include (1) “an explanation of why the agency proposed or refused to take . . . action raised in the complaint”; (2) “a description of other options that the IEP Team considered and the reasons why those options were rejected”; (3) “a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action”; and (4) “a description of the factors that are relevant to the agency’s proposal or refusal”).

80. *Id.* § 1415(c)(2)(E)(i)(I)-(II).

81. *Id.* § 1415(c)(2)(D) (noting that the hearing officer has five days to make such a determination).

82. *Id.* § 1415(f)(1)(B)(i).

83. *Id.* § 1415(h)(1)-(2).

84. See Clark, *supra* note 21, at 2.

85. *Id.* at 1-2 (citing *Drinker v. Colonial Sch. Dist.*, 888 F. Supp. 674 (E.D. Pa. 1995)). There are established exceptions for the required exhaustion of administrative exhaustion. See *infra* Section II.D.

86. 20 U.S.C. § 1415(i)(1)(A).

87. *Id.* § 1415(g)(1).

aggrieved can appeal to the second level of administrative review.⁸⁸ In a one-tiered system, and those cases decided at the second level in a two-tiered system, the party aggrieved may appeal the officer's determination by bringing an action in federal or state court, but successfully getting into court requires stringent adherence to the IDEA's statutory language.⁸⁹

An integral aspect of the IDEA's language is that only the "party aggrieved" by a hearing officer's decision can have that determination reviewed by a separate adjudicatory body.⁹⁰ A parent may prevail at the hearing by receiving an order for the district to take remedial measures; yet, if the district refuses to comply or complies inadequately with that order, then the parent is unable to seek enforcement through the courts—the parent is not the "party aggrieved" as required under the IDEA's jurisdictional-giving language.⁹¹ As a result, courts may require that a parent who obtained a favorable outcome in an administrative hearing return to the administrative forum to reinitiate the exhaustion process relating to the issue of district compliance.⁹² If a district fails to conform to a hearing officer's order, then *Norris v. Board of Education* opined that an adequate remedy is "plainly available" to parents in the form of additional administrative proceedings,⁹³ resulting in that court dismissing the civil action for lack of jurisdiction.⁹⁴ Thus, parents who technically prevail in the initial hearing process have no other

88. See Wasserman, *supra* note 21, at 359 (citing 20 U.S.C. § 1415(i)(2)(A)).

89. See *id.*

90. See *id.* at 388-89.

91. See *id.* at 359, 389 ("When parents or the applicable agency are aggrieved by the decision at Tier I in a one-tier state, or the Tier II decision in a two-tier state, they may appeal the decision by filing a civil action in federal or state court[s.]). To be a party aggrieved, the hearing officer largely must issue an order that is adverse to the parent's desired outcome. See *id.* at 389.

92. See *Norris ex rel. Norris v. Bd. of Educ.*, 797 F. Supp. 1452, 1467-69 (S.D. Ind. 1992); see also Wasserman, *supra* note 21, at 390 ("[A] plaintiff who obtains a favorable result at due process may be required to return to the administrative forum, where the nature of the due process decision contemplated further proceedings of the IEP team.").

93. See *Norris*, 797 F. Supp. at 1468 (stating that when a district failed to comply with a hearing officer's order, "an adequate remedy was plainly available" for the parent.) The court went on to note that "[w]hen a school district ignores a valid final order, the proper remedy is enforcement of that order . . . through the administrative process." *Id.*

94. See *id.* at 1469.

source for seeking district compliance but to further engage in the IDEA administrative remedy process.⁹⁵

3. *The Reasons for the Adamant Exhaustion Requirement*

When faced with a question of whether to dismiss a case for want of administrative exhaustion, courts frequently rely upon the applicability of the underlying rationales for requiring exhaustion.⁹⁶ Courts generally justify the requirement—even when the administrative hearing officer is hypothetically unable to correct the violation—by noting that the hearing process creates a detailed factual record that can be subsequently used to fully inform a court proceeding.⁹⁷ Such a requirement also allows the state educational agency to use its expertise to explore the technical educational issues presented by the dispute.⁹⁸ Promoting judicial efficiency is another oft-cited justification for requiring exhaustion because it gives the educational agencies the first opportunity to correct shortcomings in their programs for students with disabilities.⁹⁹ These justifications are the underpinnings on which courts rely in strictly enforcing the exhaustion requirement.¹⁰⁰

Courts do not always require exhaustion when these justifications are not applicable to the case at bar.¹⁰¹ The Second Circuit, for example, relied on this reasoning when it waived the

95. See, e.g., *id.* at 1468-69.

96. See, e.g., *Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1209 (9th Cir. 2004); *Bills ex rel. Bills v. Homer Consol. Sch. Dist. No. 33-C*, 959 F. Supp. 507, 511 (N.D. Ill. 1997).

97. See *Douglass v. District of Columbia*, 750 F. Supp. 2d 54, 63 (D.D.C. 2010) (“[E]ven if a hearing officer would hypothetically be unable to correct Plaintiff’s alleged systemic violations, Plaintiff’s Section 504 claim raises questions of educational policy ‘upon which the state experts should first have their say’ and which ‘the record created by the application of their expertise to those problems will certainly help the federal court resolve the issue in a more informed manner.’” (quoting *Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir. 1981))).

98. See *Christopher S.*, 384 F.3d at 1209.

99. See *id.*; see also *Bills*, 959 F. Supp. at 511 (stating that “[t]here are numerous reasons for requiring exhaustion . . . including: (1) to permit an agency to exercise its discretion and expertise; (2) to develop technical issues and a factual record prior to judicial review; (3) to prevent circumvention of agency procedures; and (4) to avoid unnecessary judicial review by allowing agencies to correct errors”); *Douglass*, 750 F. Supp. 2d at 60 (outlining the “two sound policies” that the exhaustion requirement advances).

100. See *supra* notes 97-99.

101. See *N.S. ex rel. J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 114-15 (2d Cir. 2004).

exhaustion requirement in *J.S. v. Attica Central Schools*.¹⁰² This case involved six students who claimed that the district's programming as a whole violated the students' rights to a free and appropriate education under the IDEA.¹⁰³ While the court did not deny the importance of exhaustion in "textbook" cases concerning the IDEA, it held that *J.S.* was not a "textbook" case.¹⁰⁴ The issue in *J.S.* concerned the district's total failure to prepare and implement students' IEPs,¹⁰⁵ rather than a simplified dispute regarding the mere contents of an individual student's IEP.¹⁰⁶ As such, the court held that the plaintiffs' claims were not the standardized type from which a court would substantially benefit by having an administrative record.¹⁰⁷ When it comes time for courts to determine whether to dismiss a case for lack of exhaustion or to proceed to adjudicate the merits of the claim, its "inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purpose of exhaustion."¹⁰⁸ In the absence of the foundational reasons for mandatory exhaustion, then, waiving the exhaustion requirement is supported.¹⁰⁹

102. See *id.* at 115.

103. See *id.* at 110-12 (stating that the students alleged twenty-seven ways that the district failed to comply with the IDEA in a systematic manner).

104. See *id.* at 114-15 ("We acknowledge *Hope*'s recognition of the importance of exhaustion in 'textbook' cases presenting issues involving individual children where the remedy is best left to educational experts operating within the framework of the local and state review procedures. However, the complaint in this case does not allow us to conclude that this is such a 'textbook' case—at least not at this stage of the proceedings. The district court made clear that the complaint does not challenge the content of Individualized Education Programs, but rather the School District's total failure to prepare and implement Individualized Education Programs." (referencing *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995))).

105. See *id.* at 115.

106. See *id.*

107. See *id.* at 114; see also *Virginia H. ex rel. Kristi H. v. Tri-Valley Sch. Dist.*, 107 F. Supp. 2d 628, 633 (M.D. Pa. 2000) ("If no factual record needs to be developed, i.e. the matter is purely legal, to proceed through the administrative proceedings is unnecessary.").

108. See *Hoelt v. Tuscon Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992) (citing *Bowen v. City of New York*, 476 U.S. 467, 484 (1986); *McKart v. United States*, 395 U.S. 185, 193 (1969)); see also *Bailey ex rel. J.B. v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 596 (8th Cir. 2013) (stating that a plaintiff must show that the alleged violation "in the proceedings is such that it would not further the underlying purposes of exhaustion" to be granted a waiver).

109. See *supra* note 107.

Districts face the stringent requirements of the IDEA¹¹⁰ with increasingly less money.¹¹¹ Fewer financial resources have caused many districts to plunge into economic distress, resulting in the consolidation of schools as a cost-saving measure.¹¹² When parents attempt to require a district to comply with the IDEA during a school-closing process, however, they are faced with numerous limitations due to the IDEA's strict statutory requirements.¹¹³ These obstacles taken together create a demanding exhaustion barrier for parents to overcome when seeking to ensure IDEA enforcement during a school closing.¹¹⁴

II. SCHOOL CLOSINGS AND PARENTS FIGHTING TO STOP THEM

With an increase in school closings due to financial constraints, parents have resorted to court action in an attempt to safeguard a student's rights under the IDEA during a closure.¹¹⁵ Reliance on a preliminary injunction to temporarily stop a school closing is an increasingly used method among parents for seeking IDEA enforcement in the face of a school closing.¹¹⁶ The CPS case, *Swan v. Board of Education of Chicago*, illustrates how courts approach parents' attempts to get a preliminary injunction for this very reason.¹¹⁷ Looking at how courts generally approach civil actions brought without first exhausting the IDEA administrative remedies¹¹⁸ helps to expose the limitations of the administrative-exhaustion

110. See *supra* Section I.B (providing an overview of the IDEA's statutory requirements).

111. See *supra* Section I.A (discussing how declining state tax revenue has led to decreasing finances for districts).

112. See *supra* Section I.A (discussing the cost-saving measures implemented by districts, which include closing schools).

113. See *infra* Section II.B (explaining the specific procedures that a parent must take when seeking IDEA enforcement).

114. See *infra* Part III.

115. See, e.g., *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *1 (N.D. Ill. Aug. 15, 2013); *Comb v. Benji's Special Educ. Acad., Inc.*, 745 F. Supp. 2d 755, 766 (S.D. Tex. 2010).

116. See *infra* Section II.A (discussing the legal implications of a preliminary injunction).

117. See *infra* Section II.B (describing the claims in the CPS case and how the court approached them).

118. See *infra* Section II.C (explaining the instances in which courts will dismiss an action for failure to exhaust administrative remedies).

process.¹¹⁹ Understanding the determinative role that administrative exhaustion plays is essential for grappling with the serious challenges that parents face when seeking to protect a student's access to a free and appropriate education under the IDEA during school closings.¹²⁰

A. Relying on a Preliminary Injunction for IDEA Compliance

Seeking a preliminary injunction is a tactic that parents rely upon in an attempt to temporarily prevent their child's school from closing due to an alleged IDEA violation.¹²¹ The increased prevalence of school closings due to financial strains¹²² and the resulting student placement in new schools have caused parental concerns that their district—in its haste to close the schools and reassign the students—is violating their students' rights under the IDEA.¹²³ A preliminary injunction, or a temporary restraining order (TRO) in some instances,¹²⁴ is an avenue through which the parents can lessen that haste to ensure that their students' rights are not overlooked.¹²⁵

The allure of seeking a preliminary injunction is a result of its unique, short-term legal consequence of preserving the status quo.¹²⁶ While preliminary injunctions were once used only in extraordinary circumstances, courts issue them with much more frequency in modern American jurisprudence.¹²⁷ A party may in some instances

119. See *infra* Section II.D (illustrating the scenarios in which courts will waive the exhaustion requirement).

120. See *infra* Part III.

121. See, e.g., *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *1 (N.D. Ill. Aug. 15, 2013); *Comb v. Benji's Special Educ. Acad., Inc.*, 745 F. Supp. 2d 755, 761, 766 (S.D. Tex. 2010) ("Plaintiffs seek a temporary restraining order and injunctive relief to order Defendants to refrain from closing the Academy . . .").

122. See *supra* Section I.A.

123. See *infra* Section III.B.

124. For a brief overview of the difference between a preliminary injunction and a TRO, see *infra* notes 128-30 and accompanying text.

125. See *Swan*, 2013 WL 4401430, at *1; see also *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 106-07 (2d Cir. 2009).

126. See, e.g., *Garcia*, 561 F.3d at 107; *Weintraub v. Hanrahan*, 435 F.2d 461, 463 (7th Cir. 1970); *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1082 (C.D. Ill. 2001).

127. See KRISTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 3 (2009) (stating that "in this rapidly developing era of social change, technological development, and government legislation and regulation, the once-

first seek a TRO prior to a preliminary injunction,¹²⁸ as a TRO preserves the status quo until a court can hear the merits on the action for the more permanent-in-nature preliminary injunction.¹²⁹ The benefit of the issuance of a preliminary injunction for the harmed party is clear—the preliminary injunction provides a legally enforceable mechanism to minimize a hardship while the underlying issue can be properly resolved.¹³⁰ In instances of a school closing and an IDEA violation, for example, a preliminary injunction can require the district to temporarily halt the school closing so that the district can remedy an IDEA violation related to the closure prior to its continuation.¹³¹

The elements required to issue a preliminary injunction play a determinative role in a parent's pursuit of seeking IDEA enforcement.¹³² While there are jurisdictional differences regarding the requirements to obtain a preliminary injunction,¹³³ the five-part test generally encompasses the considerations of the other two widely used tests.¹³⁴ Courts applying the five-part test require that the

extraordinary remedy of preliminary injunctive relief now appears to be quite ordinary”).

128. See, e.g., *Crue*, 137 F. Supp. 2d at 1078, 1082-83. A TRO can, in certain instances, be issued without initial notice to the opposing party, but will typically last no more than ten days. See THOMAS E. PATTERSON, HANDLING THE BUSINESS EMERGENCY: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 17 (2009). Once a preliminary injunction is issued, it is generally not dissolved until deemed appropriate by a court. See *id.*

129. See *Garcia*, 561 F.3d at 107 (quoting *Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 842-43 (2d Cir. 1962)).

130. See *Crue*, 137 F. Supp. 2d at 1082 (stating that the motivation for seeking a TRO is to “minimize the hardship to the parties pending the ultimate resolution of the suit”).

131. See, e.g., *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (“According to Plaintiffs, the schedule for the closures will not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented, nor will there be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act].”).

132. See *infra* Section II.B.

133. Courts typically apply the same standard for evaluating a TRO, unless a court issues it *ex parte*, in which case a higher standard applies. See STOLL-DEBELL, DEMPSEY & DEMPSEY, *supra* note 127, at 30-31 (citing FED. R. CIV. P. 65(b)).

134. The “traditional test” involves a four-part inquiry into: (1) “the movant’s likelihood of success on the merits”; (2) “the likelihood of irreparable harm absent preliminary injunctive relief”; (3) “the balance of harms between the movant and the nonmovant”; and (4) “the public interest.” *Id.* at 20. The three-part test requires that the movant establish “that it is subject to irreparable harm”; and either (a) “that it will likely succeed on the merits”; or (b) “that there are sufficiently

movant “establish (1) a reasonable likelihood of success on the merits of the underlying claim; (2) no adequate remedy at law; and (3) irreparable harm if the injunction is not granted.”¹³⁵ Once the first three elements are met, a court will then consider (4) whether the alleged harm to the movant absent the preliminary injunction outweighs the potential harm that the preliminary injunction will inflict on the defendant; and (5) whether the issuance of the preliminary injunction will disserve the public interest.¹³⁶ This five-part test is notably used by the Seventh Circuit and played a central role in the parents’ failed attempt to obtain a preliminary injunction in the CPS case, *Swan v. Board of Education of Chicago*.¹³⁷

B. Swan v. Board of Education of Chicago

The CPS case¹³⁸ illustrates how a court will approach an action for a preliminary injunction due to an alleged IDEA violation absent administrative exhaustion.¹³⁹ As a result of CPS announcing plans to close forty-nine schools over a single summer,¹⁴⁰ parents of students with disabilities¹⁴¹ brought two separate actions for preliminary injunctions against CPS to temporarily prevent the schools from closing.¹⁴² The first suit alleged that the school-closing schedule would disproportionately harm children in special education

serious questions going to the merits of the case to make them a fair ground for litigation and that a balancing of the hardships tips ‘decidedly’ in favor of the moving party.” *Id.* at 21 (internal quotation marks omitted) (citing *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 424 (2d Cir. 2004)).

135. *Id.* at 21-22 (citing *Foodcomm Int’l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003)); see also *Jones v. Infocure Corp.*, 310 F.3d 529, 534 (7th Cir. 2002).

136. See, e.g., *STOLL-DEBELL, DEMPSEY & DEMPSEY*, *supra* note 127, at 22 (citing *Foodcomm Int’l*, 328 F.3d at 303); see also *Jones*, 310 F.3d at 534.

137. See *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *11 (N.D. Ill. Aug. 15, 2013).

138. See *supra* INTRODUCTION.

139. For an additional case discussing the exhaustion requirement in the context of a school closing, see *Comb v. Benji’s Special Education Academy, Inc.*, 745 F. Supp. 2d 755, 771-72 (S.D. Tex. 2010) (holding that exhaustion of administrative remedies is required absent a showing that exhaustion would be futile before bringing the action for a preliminary injunction in the context of a school closing).

140. See *Swan*, 2013 WL 4401439, at *1.

141. In a second lawsuit, parents of African-American students brought an action against CPS claiming that the school closing would result in African-American students suffering “a greater degree of harm” as compared to their non-African-American peers. See *id.*

142. See *id.*

programs, compared to their peers in general education, by not providing adequate time at the new schools for the implementation of the IEPs of students classified as disabled under the IDEA.¹⁴³ The second suit alleged that the school closings would destroy the students' relationships with teachers and peers, prevent the students from having their IEPs revised, and place their children in new schools with unfamiliar and dangerous commutes.¹⁴⁴ Due to the looming school start date, the parties agreed to consolidate the claims, and the court granted an expedited discovery motion to be followed by a four-day preliminary injunction hearing, all over a mere month before the start of school.¹⁴⁵

For the more than 2,000 students with disabilities within CPS that would be impacted by the school closings, the district took a number of steps—exposed through discovery and witness testimony—in an attempt to ensure IDEA compliance.¹⁴⁶ The district held an outreach campaign for families with students with disabilities, where it hosted meetings at each closing school to explain the transition process¹⁴⁷ and reached out to each family to answer questions related specifically to each family's child.¹⁴⁸ The special education department reviewed the IEP of each student affected by the closures to ensure that proper supports were in place,¹⁴⁹ and the faculty in the schools receiving new students with disabilities was required to complete training programs over the summer that included customized disability awareness training.¹⁵⁰ The district went so far as to take photographs of the closing school

143. *See id.* at *2 (stating that the closing schedule would “not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented” and that there would not “be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act]”).

144. *See id.*

145. *See id.*

146. *See id.* at *9 (stating that the district took steps to ensure that “(a) students with disabilities know their new school and feel welcome; (b) the staff understands the needs of students; (c) instructional supports and equipment are in place and teachers know how to use them; (d) schools have provided activities to support the transitions; (e) the students are scheduled in accordance with their IEPs; and (f) any necessary IEP revisions have been completed” (citing Hr’g Tr. at 788-89; Hr’g Exs. 24, 29)).

147. *See id.* (citing Hr’g Tr. at 807-08, 814).

148. *See id.* (citing Hr’g Tr. at 814-15).

149. *See id.* at *10 (citing Hr’g Tr. at 828-29, 835).

150. *See id.* (citing Hr’g Tr. at 794-95).

classrooms in an attempt to replicate them in the new schools,¹⁵¹ down to matching the color of the computer cords for certain students' classrooms.¹⁵² Despite the unveiling of these comprehensive steps during discovery and the hearing, the parents continued through the trial-like hearing process, proclaiming that the district was neither taking the time nor putting the resources into ensuring full IDEA compliance during the school closings.¹⁵³

Though the entire case was completed within just three months, it resulted in a comprehensive factual record supplemented by numerous expert witnesses on which the court relied.¹⁵⁴ The court provided a nearly thirty-page opinion discussing how the facts in the case corresponded to the required elements for the issuance of a preliminary injunction.¹⁵⁵ Despite this detailed attention to the merits of the claims, the court relied in part on the parents' failure to first exhaust the administrative remedies in rejecting their motion for a preliminary injunction.¹⁵⁶ Without first exhausting the IDEA administrative remedies, the parents could not demonstrate the absence of an adequate remedy for the alleged harms, an essential element for a preliminary injunction.¹⁵⁷ The court nonetheless evaluated the remaining elements and held that the parents were not likely to succeed on the merits based on the presented evidence¹⁵⁸—even though the single fact that the parents failed to exhaust the administrative remedies was alone dispositive to defeat the preliminary injunction claim.¹⁵⁹

151. See *id.* (citing Hr'g Tr. at 439, 800-01).

152. See *id.* at *15 (citing Hr'g Tr. at 800-01).

153. See *id.* at *1-2.

154. See *id.* at *2, *29.

155. See *id.* at *1-29.

156. See *id.* at *19, *28.

157. See *id.* at *28 (“Thus, Plaintiffs’ have failed to demonstrate that the administrative review process cannot provide a remedy for the harms they allege. Plaintiffs have failed, therefore, to show that there is not an adequate remedy at law for their ADA claims.”). While this aspect of the opinion discussed the plaintiffs’ claim under the Americans with Disabilities Act (ADA), the court noted that the parents were nonetheless making a claim of an IDEA violation. See *id.* at *27.

158. See *id.* at *27-28 (stating that the parents failed to present “persuasive evidence that the harm they will suffer without an injunction is greater than the harm [that] others will suffer, including other students, if an injunction was granted”).

159. See *id.* at *27.

C. Without Exhausting, an IDEA Action “Must Fail”

As the CPS case illustrates, courts adamantly require that IDEA disputes proceed through the exhaustion process prior to the claim having merit in civil court.¹⁶⁰ The administrative hearing process allows education professionals to have “the first crack” at resolving a parent’s complaint.¹⁶¹ Without allowing for this administrative first crack, the claims under the IDEA “must fail.”¹⁶² Even when it is unclear whether the administrative process is able to provide an adequate remedy for the underlying IDEA violation, exhaustion is typically still required.¹⁶³

Courts reason that requiring exhaustion when relief is uncertain is appropriate because parents cannot be certain that no administrative relief exists without first going through the administrative remedy process.¹⁶⁴ When the alleged IDEA violations have their roots in educational services, relief is hypothetically available under the IDEA because the statute provides remedies to educational issues by way of the hearing process.¹⁶⁵ Litigating whether administrative exhaustion is required can be an elongated process and consumes scarce judicial resources.¹⁶⁶ As the Ninth Circuit noted, parties in an IDEA case litigated whether exhaustion should be required over a four-year period.¹⁶⁷ The court’s dissent pointed out that a resolution on the underlying IDEA question would have been reached far more quickly without the preliminary exhaustion dispute.¹⁶⁸ Courts often strictly enforce the

160. *See id.*

161. *See* Neil F. *ex rel.* Charlie F. v. Bd. of Educ., 98 F.3d 989, 992 (7th Cir. 1996).

162. *See* Comb v. Benji’s Special Educ. Acad., No. H-10-3498, 2012 WL 1067395, at *8 (S.D. Tex. Mar. 28, 2012) (“There is no evidence to support an exemption from the administrative exhaustion requirement. Thus, the Parent-Plaintiffs’ claims under both the IDEA and Section 1983 must fail.”).

163. *See* Ellenberg *ex rel.* S.E. v. N.M. Military Inst., 478 F.3d 1262, 1276 (10th Cir. 2007).

164. *See* Charlie F., 98 F.3d at 993.

165. *See id.* (“[When b]oth the genesis and the manifestations of the problem are education[,] the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.”).

166. *See generally* Rita S. *ex rel.* Christopher S. v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting).

167. *See id.*

168. *See id.* (“I cannot help but note that this lawsuit concerns a schedule announced at the beginning of the 2000–01 school year, more than four years ago. By inviting appeal of district court determinations that plaintiffs should be required

administrative-exhaustion requirement regardless of the time consumed litigating its applicability and despite that enforcement will result in the claim's summary dismissal based not on its underlying merits.¹⁶⁹

D. Recognizing the Limits of Administrative Remedies

Despite the strict IDEA procedural mandates,¹⁷⁰ there are instances in which courts recognize the limits of the administrative-exhaustion requirement. The Eighth Circuit in *Barron ex rel. D.B. v. South Dakota Board of Regents* held that parents challenging the closure of a school were not required to exhaust the administrative remedies before bringing a motion for a preliminary injunction due to an alleged IDEA violation.¹⁷¹ The parents in *Barron* sought to prevent the state from moving programs for their deaf or hard-of-hearing children to a different district.¹⁷² After acknowledging that the IDEA typically requires administrative exhaustion prior to bringing a civil action,¹⁷³ the court held that such a requirement in this case was not appropriate.¹⁷⁴ In waiving administrative exhaustion, the court reasoned that if the parents' underlying IDEA claim had merit, then the administrative hearing process was unlikely to provide adequate relief.¹⁷⁵ When, assuming that the IDEA claim is meritorious, the hearing officer would be unable to issue the necessary relief for the violation, Congress specified that exhaustion should not be required.¹⁷⁶ Thus, as a practical matter, it was improbable that an administrative hearing officer could require the

to exhaust administrative remedies before proceeding in court, our decision here will likely encourage more court activity rather than less. That is not what Congress intended.”).

169. See, e.g., *id.*; *Charlie F.*, 98 F.3d at 992-93.

170. See *supra* Section I.B.

171. See 655 F.3d 787, 791-92 (8th Cir. 2011).

172. See *id.* at 791.

173. See *id.* at 792 (citing 20 U.S.C. § 1415(i) (2006)).

174. See *id.* at 793.

175. See *id.* at 792 (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002)).

176. See *id.* (“Congress specified that exhaustion is not necessary if . . . “it is improbable that adequate relief can be obtained by pursuing administrative remedies.”” (quoting *Murphy*, 297 F.3d at 199)). The court went on to state that the administrative remedies process is appropriate for questions related to “any matter[] relating to the identification, evaluation or educational placement of a child with a disability, or the provision of [a free and appropriate education] to the child.” See *id.* at 792-93 (quoting S.D. ADMIN. R. 24:05:30:07.01 (2007)).

district to reverse its decision to change the location of the students' program—the hearing officer is generally limited to rectifying issues only relating to the contents of a student's IEP.¹⁷⁷ After waiving the exhaustion requirement, the court proceeded without delay to adjudicate the merits of the claimed IDEA violation.¹⁷⁸

The Second Circuit came to a similar conclusion when it recognized that case law carved out a futility exception for requiring administrative exhaustion.¹⁷⁹ In waiving the exhaustion requirement, the court in *Heldman v. Sobol* relied on an exception used in circumstances in which exhaustion would be futile—when the administrative procedures cannot provide an adequate remedy.¹⁸⁰ In *Heldman*, the court waived mandatory administrative exhaustion because the hearing officer did not have the power to alter the state statutory procedure allegedly violating the IDEA.¹⁸¹ When the administrative hearing officer lacks the authority to alter the alleged harm, both *Barron* and *Heldman* indicate that requiring exhaustion is a mere exercise in futility and should, therefore, be waived.¹⁸²

An additional explicit method of waiving the exhaustion requirement under the IDEA is through the Act's "stay-put" provision.¹⁸³ While this provision is not applicable to questions of a

177. See *id.* at 793 ("We agree with the district court that [i]n consideration of the administrative scheme, and as a practical matter, it may be more than improbable that a hearing officer could ultimately enforce an order to the Board of Regents to reverse its policy of cutting programs at the school's physical location and out-sourcing services to home school districts." (citation omitted) (internal quotation marks omitted)).

178. See *id.* at 792-93.

179. See *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 158 (2d Cir. 1992).

180. See *id.*

181. See *id.* at 159 ("Resort to the New York state administrative process in this case would be futile. Heldman claims that the NYSED regulation specifying the hearing officer selection procedure violates the mandate of IDEA. Because the regulation implements a New York statute, neither the Commissioner nor the assigned hearing officer has the authority to alter the procedure; therefore, it would be an exercise in futility to require Heldman to exhaust the state administrative remedies." (citing *Monahan v. Nebraska*, 491 F. Supp. 1074, 1086 (D. Neb. 1980))).

182. See *id.*; *Barron*, 655 F.3d at 793.

183. See *Guardians Ad Litem ex rel. N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010) ("Exhausting the administrative process would be inadequate because the stay-put provision (and therefore the preliminary injunction) is designed precisely to prevent harm while the proceeding is ongoing." (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199-200 (2d Cir. 2002))).

preliminary injunction related to a school closing,¹⁸⁴ its underlying justifications for waiving exhaustion are insightful.¹⁸⁵ The stay-put provision is a procedural safeguard requiring that during the pendency of any proceeding relating to a change in a student's educational placement, the student shall remain in his or her "then-current educational placement."¹⁸⁶ The Ninth Circuit held that the exhaustion requirement need not be met when seeking to enforce the stay-put provision of the IDEA.¹⁸⁷ The stay-put provision's purpose, similar to a preliminary injunction, is to prevent the alleged harm while the underlying issue is resolved.¹⁸⁸ A hearing officer lacks the power to order a district to retain a student in his or her "then-current educational placement," so requiring administrative exhaustion would be insufficient.¹⁸⁹ The stay-put provision protects students when the time-sensitive nature of an action should control, as the potential harm will have already occurred if the student is forced to change his or her educational placement during the dispute regarding the appropriateness of that change.¹⁹⁰ The critical question

184. The stay-put provision is very limited in its application. *See infra* notes 186, 190, and accompanying text.

185. *See infra* Section III.D.

186. *See* 20 U.S.C. § 1415(j) (2012). A student's "educational placement" means the student's general educational programming, and a change in such a placement "relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction." *N.D.*, 600 F.3d at 1116. "A change in the educational placement can also" occur "when there is a significant change in the student's program even if the student remains in the same setting." *Id.* Educational placement does not, however, refer to "the 'bricks and mortar' of the specific school." *T.Y. ex rel. T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009). For a detailed overview and critique of the stay-put provision, see Valerie Boland, Note, *Courts Misinterpret "Stay Put" Provision of Individuals with Disabilities Education Act: Did Congress Really Intend to Take Services Away from Children with Disabilities?*, 57 *DRAKE L. REV.* 1007 (2009).

187. *N.D.*, 600 F.3d at 1110-11 (adopting the framework of *Murphy*, 297 F.3d at 199-200).

188. *See id.* ("Exhausting the administrative process would be inadequate because the stay-put provision (and therefore the preliminary injunction) is designed precisely to prevent harm while the proceeding is ongoing." (citing *Murphy*, 297 F.3d at 199-200)).

189. *See id.* (citing *Murphy*, 297 F.3d at 199-200); *see also* 20 U.S.C. § 1415(i) (2006).

190. *See N.D.*, 600 F.3d at 1110-11 ("The stay-put provision recognizes the need for the child to keep her current educational placement as the administrative process tries to sort out alternatives. If the child is moved from the current placement during the process, then the deprivation of the right has occurred. The completion of the administrative process cannot remedy the harm. Access to the

concerning waiving the exhaustion requirement in the stay-put context is whether the delay caused by the administrative-exhaustion process should be subjugated by the immediacy of the alleged harm.¹⁹¹

A preliminary injunction is a powerful tool, but without first exhausting the IDEA administrative remedies a court is unlikely to issue such an order.¹⁹² The CPS case, *Swan*, illustrates the determinative role that administrative exhaustion can play in bringing a civil action,¹⁹³ though requiring administrative exhaustion is not appropriate in all circumstances.¹⁹⁴ Much stands in the way between a parent and his or her ability to require a district to comply with the IDEA.¹⁹⁵ These demanding IDEA requirements work together to create an administrative-exhaustion barrier that is difficult to overcome in a timely manner.¹⁹⁶

III. THE EXHAUSTION BARRIER

When parents bring an action based on an alleged IDEA violation for a preliminary injunction to temporarily prevent a school from closing, time is of the essence.¹⁹⁷ The current mandatory IDEA administrative-exhaustion framework is unsuitable in instances of an imminent school closing. The limitations of the existing IDEA structure, ranging from the narrow powers of an administrative officer¹⁹⁸ to the restrictive nature of the statute's jurisdictional-giving

preliminary injunction is essential to vindicate this particular IDEA right.” (citation omitted) (citing *Murphy*, 297 F.3d at 199-200)).

191. See *Komninos ex rel. Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 780 (3d Cir. 1994) (“[T]he critical question is whether there is such immediacy of harm as to preclude delay until the administrative process is completed. . . . A showing at the time the suit is filed in the district court, however, that the [harm to the student] will be irreversible would demonstrate irreparable harm and would relieve plaintiffs from the obligation to finish the administrative process before seeking judicial relief.”).

192. See *supra* Section II.C.

193. See *supra* Section II.B.

194. See *supra* Section II.D.

195. See *infra* Part III.

196. See *infra* Part III.

197. See *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (“On May 23, 2013, the [c]ourt granted the parties leave to proceed with expedited discovery and scheduled a four-day preliminary injunction hearing for July 16, 2013.”).

198. See *infra* Section III.A.

language,¹⁹⁹ leave parents with limited options for seeking IDEA enforcement. Further buttressing the limitations of mandatory administrative exhaustion in this context is the void of the underlying rationales in support for the exhaustion process.²⁰⁰ Courts have shown their willingness to recognize the boundaries of mandatory exhaustion by carving out narrow exceptions in instances of the IDEA's stay-put provision and imminent school closings.²⁰¹ Against this backdrop, it becomes clear that a modification to the IDEA is needed to alleviate the current exhaustion barrier.²⁰² Without addressing these obstacles to IDEA enforcement, there is a serious risk that an otherwise meritorious IDEA claim will go unaddressed by the courts due to a parent's inability to directly bring a civil action.²⁰³

A. Limited Powers of an Administrative Hearing Officer

Administrative hearing officers' powers are far from unlimited.²⁰⁴ The officers' ability to issue orders is generally limited to determining the sufficiency of a student's disability classification and the implementation of the IDEA's requirements and to ordering districts to take corrective action to come into compliance with the Act.²⁰⁵ When an administrative hearing officer lacks the power to order an appropriate remedy, requiring administrative exhaustion is not proper.²⁰⁶ In *Barron ex rel. D.B. v. South Dakota Board of Regents*, the Eighth Circuit waived the exhaustion requirement for this very reason—the inability of the hearing officer to issue the necessary remedy made exhaustion, as a practical matter, unsuitable.²⁰⁷ If the underlying IDEA violation claimed by the

199. See *infra* Section III.B.

200. See *infra* Section III.C.

201. See *infra* Section III.D.

202. See *infra* Subsection III.E.1.

203. See *supra* Section II.C.

204. See Zirkel, *supra* note 70, at 9.

205. See *id.* While the hearing officer has the power to take these actions, this power is largely restricted to ordering the district to take steps relating specifically to the student's educational services—it does not, however, extend to ordering the district to take wider action, such as unilaterally stopping a district from closing a school. See *id.*

206. See *Barron ex rel. D.B. v. S.D. Bd. of Regents*, 655 F.3d 787, 792 (8th Cir. 2011) (“We conclude that the parents were not required to exhaust because, if their position was well founded and the Board's actions violated the IDEA, adequate relief likely could not have been obtained through the administrative process.”).

207. See *id.* at 793.

plaintiffs was occurring, then the court held that the hearing officer would not have within his or her power the ability to prevent a district's school board from cutting school programs.²⁰⁸

The Eighth Circuit's reasoning in waiving exhaustion in *Barron* is telling because it indicates that exhaustion should not be required when, in the event that the underlying claim is accurate, the hearing officer's authority to order the necessary remedy is improbable.²⁰⁹ In reviewing an administrative officer's powers, absent from the list is the ability to issue a preliminary injunction to temporarily stop a district from closing a school or to reverse an initiated school closing.²¹⁰ Using the *Barron* reasoning, then, if a parent seeks a preliminary injunction due to an alleged IDEA violation during the school-closing procedures, then exhaustion should be waived because it is improbable that the administrative officer can issue such an order.²¹¹

Courts should apply the *Barron* reasoning and waive exhaustion at the outset of an action seeking a preliminary injunction for an alleged IDEA violation for school closings.²¹² If exhaustion is not waived and the hearing officer concludes that the district must reevaluate its closing procedures to comply with the IDEA, thereby requiring a temporary hold on the district's school-closure plans,²¹³ then the officer simply has no authority to take this necessary action.²¹⁴ Adopting this approach is one step to avoid the unnecessary and damaging time delay of requiring exhaustion in the context of an imminent school closing.²¹⁵

208. See *id.* at 792; see also *supra* note 74 and accompanying text.

209. See *Barron*, 655 F.3d at 792.

210. See Zirkel, *supra* note 70, at 9; see also *Barron*, 655 F.3d at 792.

211. See *Barron*, 655 F.3d at 793.

212. See *id.*

213. The plaintiffs in *Swan* sought, among other things, for CPS to reevaluate its school closing procedures. See *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) ("According to Plaintiffs, the schedule for the closures will not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented, nor will there be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act].").

214. See *supra* note 210 and accompanying text.

215. See *Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting the extensive time that exhaustion litigation can require).

B. The IDEA's Jurisdictional Dilemma: The "Party Aggrieved" Requirement

If an administrative hearing officer does order a form of relief,²¹⁶ there are great restrictions on a parent's ability to ensure that the district complies with the order.²¹⁷ The proper remedy for a district failing to follow an administrative order is for the parent to seek enforcement of that order.²¹⁸ The only available avenue for enforcement under the IDEA, however, is for the parent to reengage the administrative hearing process, as the parent is not the party aggrieved—depriving a court of jurisdiction to hear the claim.²¹⁹ Failing to restart the administrative-exhaustion process will likely result in a court dismissing the claim for lack of jurisdiction based on the IDEA's explicit statutory language.²²⁰

The IDEA's jurisdictional-giving language provides that only the "party aggrieved" can bring an enforcement action to the courts.²²¹ *Norris v. Board of Education* illustrates how the party aggrieved requirement works in practice.²²² The parent of a student with disabilities in *Norris* initially exhausted the administrative remedies as required by the IDEA and received a favorable hearing outcome.²²³ Yet, due to the district's noncompliance with the administrative order, the parent brought an action in court to require

216. The IDEA allows an administrative hearing officer to issue a form of remedy that neither party requested but that the officer believes would be appropriate under the IDEA. *See, e.g.,* Neil F. *ex rel.* Charlie F. v. Bd. of Educ., 98 F.3d 989, 991 (7th Cir. 1996) ("The [IDEA] speaks of available relief, and what relief is 'available' does not necessarily depend on what the aggrieved party wants.").

217. *See infra* notes 218-20 and accompanying text.

218. *See Norris ex rel.* Norris v. Bd. of Educ., 797 F. Supp. 1452, 1468 (S.D. Ind. 1992) ("When a school district ignores a valid final order, the proper remedy is enforcement of that order.").

219. *See id.*

220. *See id.* at 1469.

221. *See* Wasserman, *supra* note 21, at 388-89; *see also* Hunter *ex rel.* Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278 n.10 (3d Cir. 1996) ("The argument against the applicability of [20 U.S.C.] § 1415(e)(2) would be that the Hunters, in seeking judicial assistance to enforce portions of the IDEA administrative decision, were not persons 'aggrieved by the findings and decision' within the meaning of § 1415(e)(2), but rather persons aggrieved by the failure of the local school officials to implement the decision. The counter-argument would be that the Hunters were 'aggrieved' by the fact that the administrative orders favorable to the Hunters contained no enforcement mechanisms.").

222. *See Norris*, 797 F. Supp. at 1467-68.

223. *See id.* at 1457-58.

the district to conform to the hearing officer's determination.²²⁴ Although the parent faced an uncooperative district, the court dismissed the case for lack of jurisdiction because the parent was not the party aggrieved under the IDEA's strict jurisdictional-giving language.²²⁵

Requiring a parent to be the party aggrieved by an administrative hearing's outcome places a soaring hurdle in the path of a parent seeking IDEA enforcement in the process of a school closing.²²⁶ While some on the bench argue that this requirement "does not mean that their claims will be unfairly or improperly denied" because court review is eventually available,²²⁷ this continuous exhaustion requirement "make[s] no sense" in application.²²⁸ When a parent complies with the IDEA by initially completing the exhaustion process, but cannot get the district to comply with the hearing officer's order, the only available avenue to seek enforcement is through additional administrative exhaustion—meanwhile, the underlying IDEA violation continues unresolved.²²⁹

When a district is in the midst of planning or implementing a school closing, there is no time to engage in the cycle of exhaustion as required by the IDEA. Restarting the exhaustion process and litigating whether more exhaustion is required before a court has jurisdiction is very time consuming.²³⁰ Yet, courts continue enforcing the strict exhaustion requirement by reading the IDEA's jurisdictional language narrowly.²³¹ When faced head-on with this circular exhaustion requirement, the *Norris* court rejected the

224. *See id.*

225. *See id.* at 1468-69 ("Plainly, a complaint that a school ignored a hearing officer's order may be remedied through the administrative process. Plaintiffs failed to seek this type of required remedy.").

226. *See id.* (dismissing an IDEA claim for lack of jurisdiction because the parent received a favorable decision through the administrative hearing process, though the district subsequently failed to comply with the order).

227. *See Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting).

228. *See Wasserman, supra* note 21, at 389.

229. *See id.*

230. *See Christopher S.*, 384 F.3d at 1220 (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).

231. *See Norris*, 797 F. Supp. at 1468-69 (requiring that a party seeking to enforce a district to comply with an administrative hearing officer's order must re-exhaust the administrative process because the plaintiff was not the party aggrieved); *see also Hunter ex rel. Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 278 n.10 (3d Cir. 1996).

parent's argument that the party aggrieved requirement was a "catch-22"²³² situation.²³³ The parent argued that she could not have her case heard in front of an adjudicative body that had the power to enforce compliance with the IDEA, as her only option was more ineffective administrative hearings.²³⁴

When the date of a school closing grows closer, this exhaustion cycle is the epitome of a catch-22. On the one hand, a parent complies with the IDEA by exhausting the administrative remedies in which a favorable ruling is provided; but, on the other hand, that parent cannot have the favorable order enforced by an adjudicative body that possesses the power to require the district to comply.²³⁵ Consequently, a parent is forced to return to the proven ineffective administrative process.²³⁶ All the while, the student's access to a free and appropriate education, which the IDEA is designed to ensure,²³⁷ is left in the questionable state that motivated the initial lawsuit while the school-closing schedule forges ahead. This procedural exhaustion requirement allows a district to exhaust the parent into giving up the fight for the student's IDEA rights during the school-closing process.²³⁸ There is simply not sufficient time to engage in multiple rounds of administrative exhaustion when a school is slated to close

232. A catch-22 is "[a] dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions." OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/catch-22 (last visited Oct. 22, 2014).

233. See *Norris*, 797 F. Supp. at 1468 ("Plaintiffs incorrectly argue that they were in a 'catch-22' situation because they were not 'aggrieved' by any order but rather faced a school district unwilling to abide by a valid order.").

234. See *id.*

235. The parent is not the party aggrieved, as required by the IDEA, so a court does not have jurisdiction to hear the case. See, e.g., *id.*

236. See, e.g., *Neil F. ex rel. Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996) ("The case is remanded with instructions to dismiss for failure to use the IDEA's administrative remedies."); *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *27-28 (N.D. Ill. Aug. 15, 2013) ("[Plaintiffs] must exhaust the IDEA's administrative process before coming to federal court, unless exhaustion would have been futile. . . . Thus, Plaintiffs' [sic] have failed to demonstrate that the administrative review process cannot provide a remedy for the harms they allege. Plaintiffs have failed, therefore, to show that there is not an adequate remedy at law for their [IDEA] claims." (citation omitted)).

237. See *supra* notes 65-66 and accompanying text.

238. See *Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).

within mere months of an initiated action for a preliminary injunction due to an alleged IDEA violation.²³⁹

C. Absent Justifications for Mandatory Exhaustion

When the underlying justifications for mandatory administrative exhaustion do not substantially benefit a civil proceeding,²⁴⁰ courts will waive the exhaustion requirement.²⁴¹ As *J.S. v. Attica Central Schools* noted, in non-textbook IDEA cases—those that go beyond mere questions of the contents of a student's IEP²⁴²—the exhaustion requirement is not necessarily applicable, particularly when the purposes behind exhaustion are not furthered.²⁴³ Seeking a claim for a preliminary injunction for an alleged IDEA violation in the face of a looming school closing is a non-textbook case, making the applicability of the underlying rationales for mandatory exhaustion less than certain.²⁴⁴

As the CPS case, *Swan v. Board of Education of Chicago*, illustrates, courts have the capacity to properly adjudicate the underlying merits of a preliminary injunction claim without the assistance of the administrative agency's educational experts.²⁴⁵ In *Swan*, the parties provided the court with the necessary technical educational information by employing an array of educational experts—including experts in the areas of general education, special education, school-building utilization, and school transition plans for

239. See *id.*; see also *Swan*, 2013 WL 4401439, at *2 (allowing an expedited preliminary injunction hearing due to the looming start of the academic school year).

240. See *supra* Section II.D; see also *Christopher S.*, 384 F.3d at 1209 (majority opinion) (“The requirement that aggrieved parties exhaust their administrative remedies before filing a lawsuit . . . ‘affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.’” (quoting *Hoefl v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992))).

241. See *Bailey ex rel. J.B. v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 596 (8th Cir. 2013); *N.S. ex rel. J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 114 (2d Cir. 2004); *Hoefl*, 967 F.2d at 1303.

242. See *supra* note 104 and accompanying text.

243. See *J.S.*, 386 F.3d at 112-13, 115.

244. See *id.* at 114-15. When the claim is regarding the timeline, procedures, and student placement related to a school closing, the questions go beyond a textbook case consisting solely of issues regarding the contents of an IEP. See *supra* note 104 and accompanying text.

245. See *infra* notes 246-50 and accompanying text.

students.²⁴⁶ In all, seventeen experts and witnesses testified during the four-day hearing.²⁴⁷ Moreover, the hearing created an 877-page factual record for the court to rely upon in making its ruling.²⁴⁸ In rendering its twenty-nine page opinion, the court made no mention of a want of a better understanding of the technical educational issues or a more comprehensive factual record.²⁴⁹ It is clear from *Swan* that courts are capable of gleaned a sufficient understanding of the technical educational issues presented and developing a detailed factual record of the pertinent educational issues in order to issue an informed ruling.²⁵⁰ Thus, when it comes to an alleged IDEA violation due to a looming school closing, the case for requiring administrative exhaustion prior to bringing a civil case severely weakens without the support of its underlying rationales.²⁵¹

246. The experts and witnesses that testified are (1) Pauline Lipman, professor of educational policy studies at the University of Illinois in Chicago; (2) Kristine Mayle, former special education teacher at CPS; (3) Mandi Swan, parent of a student with a learning disability; (4) Lucy Witte, who provided an opinion concerning the impact of the closing of forty-nine elementary schools on students with disabilities; (5) Sarah Judith Hains, member of the Chicago Education Facilities Task Force; (6) Laurie Hines Siegel, who testified on the impact of the school closings on the special education population at CPS; (7) John Martin Hagedorn, expert on gang activity in Chicago; (8) Woods Bowman, who analyzed the Board of Education's financial justifications for closing the schools; (9) Sherise Renee McDaniel, parent of an allegedly impacted student; (10) Pavlyn Jankov, Chicago Teachers Union research facilitator; (11) Markay Winston, chief officer for the CPS office of diverse learner supports and services; (12) Adam Lee Anderson, officer of portfolio planning and strategy for the Chicago Board of Education; (13) Ginger Ostro, budget and grants officer for the Chicago Board of Education; (14) Annette Gurley, chief officer for teaching and learning for the Chicago Board of Education; (15) Jadine Chou, chief safety and security officer for the Chicago Board of Education; (16) Tom Tyrrell, Deputy Chief Administrative Officer for the Chicago Board of Education; and (17) Rebecca Clark, director of student supports in the office of diverse learners, supports, and services for CPS. *See* Transcript of Proceedings - Preliminary Injunction Hearing Before the Honorable John Z. Lee, *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24 (N.D. Ill. Aug. 15, 2013), ECF Nos. 138-141.

247. *See id.*

248. *See id.*

249. *See Swan*, 2013 WL 4401439 at *1-29.

250. *See supra* note 246 and accompanying text.

251. *See N.S. ex rel. J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112-15 (2d Cir. 2004) (waiving administrative exhaustion due to the inapplicability of its supportive rationales).

D. Applying the “Stay-Put” Rationales to Imminent School Closings

With the inapplicability of the traditional supportive justifications for mandatory administrative exhaustion,²⁵² the case for waiving such exhaustion is further supported by considering the rationales for waiving exhaustion in the IDEA’s stay-put provision. The stay-put provision²⁵³ is only applicable when the student’s education placement is in question.²⁵⁴ Yet, the concept underlying the stay-put provision is informative when approaching the IDEA administrative-exhaustion requirement relating to imminent school closings. The stay-put provision’s design is to ensure that a student is not harmed during an adjudicative proceeding concerning the merits of an IDEA claim.²⁵⁵ As the Ninth Circuit recently noted when presented with a stay-put provision question, because of the “time-sensitive nature” of determining a student’s proper educational placement, exhaustion of administrative remedies is not required.²⁵⁶ In light of the time sensitivity, the Ninth Circuit reasoned that the defendant’s argument in favor of requiring exhaustion, which presupposed that the administrative-exhaustion process might be effective in resolving the dispute, was not persuasive.²⁵⁷ It is essential, the court noted, that the plaintiff in this time-sensitive situation be given the ability to directly bring a court action concerning the merits of the IDEA claim.²⁵⁸

The reasoning employed by the Ninth Circuit to waive administrative exhaustion in instances of the stay-put provision is extendable to cases concerning the administrative-exhaustion requirement in circumstances of imminent school closings. The claim’s time sensitivity and mere presupposition of the hearing officer’s ability to remedy the harm was sufficiently persuasive for the Ninth Circuit to waive the administrative-exhaustion process.²⁵⁹

252. See *supra* Sections III.A-C.

253. See *supra* note 186 and accompanying text.

254. See 20 U.S.C. § 1415(j) (2012).

255. The harm in question concerns the harm to the student via a violation of his IDEA right to a free and appropriate education. See *supra* note 188 and accompanying text.

256. See *Guardians Ad Litem ex rel. N.D. v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1110 (9th Cir. 2010) (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199-200 (2d Cir. 2002)).

257. See *id.* (stating that “[t]his argument is a non-sequitur”).

258. See *id.* at 1111 (“Access to the preliminary injunction is essential to vindicate this particular IDEA right.” (citing *Murphy*, 297 F.3d at 200)).

259. See *id.* at 1110 (citing *Murphy*, 297 F.3d at 199-200).

The dangers adverted by waiving exhaustion in stay-put cases similarly exist in cases of alleged IDEA violations in contexts of impending school closings. When a school is slated to shut down in mere months, time is of the essence to resolve an IDEA-violation question concerning the transition.²⁶⁰ Yet, in the face of an elongated exhaustion process,²⁶¹ courts still adhere to the exhaustion requirement in order to allow the administrative process to have the “first crack” at resolving the problem,²⁶² even when a hearing officer’s ability to order a solution is far from certain²⁶³ or merely hypothetical.²⁶⁴ When the risk exists that the school will close prior to the completion of the administrative process, the uncertain nature of the administrative process’s ability to issue an enforceable solution is a similarly unpersuasive rationale for requiring exhaustion.²⁶⁵ Courts should follow the rationale employed in questions concerning the stay-put provision in order to evade the time-sensitive harm to students that is similarly in question when a student has an IDEA challenge due to a soon-to-close school.²⁶⁶

When a broad view is taken toward questions of the administrative-exhaustion requirement for IDEA claims, it becomes clear that exhaustion is not appropriate in many IDEA contexts.²⁶⁷ It may be the case that the presence of a single rationale for waiving IDEA exhaustion when a school is slated to close is an insufficient justification for extending a waiver. There are, however, at least four

260. See *Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years); see also *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (allowing an expedited preliminary injunction hearing due to the looming start of the academic school year).

261. See *supra* Section I.B (discussing the procedural requirements of the administrative hearing process); see also *Christopher S.*, 384 F.3d at 1220 (noting that the case at bar disputed the exhaustion process for more than four years).

262. See *Neil F. ex rel. Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 992 (7th Cir. 1996) (“[U]nder the IDEA, educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.”).

263. See *id.* at 993 (noting that the parents–plaintiffs cannot know that no remedy exists without first going through the administrative process and “that at least in principle relief is available under the IDEA”).

264. See *Douglass v. District of Columbia*, 750 F. Supp. 2d 54, 63 (D.D.C. 2010) (citing *Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir. 1981)).

265. See *Guardians Ad Litem ex rel. N.D. v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1110 (9th Cir. 2010).

266. See *supra* note 190 and accompanying text.

267. See *supra* Sections III.A-D.

applicable factors—the limited powers of the administrative hearing officer,²⁶⁸ the court’s absent jurisdiction for enforcement,²⁶⁹ the void of the traditional administrative-exhaustion justifications,²⁷⁰ and the similarities to the stay-put provision’s rationales²⁷¹—that courts have relied upon to waive mandatory exhaustion in IDEA cases.²⁷² Taken together, these rationales present a strong case for similarly waiving mandatory IDEA administrative exhaustion when presented with a time-sensitive situation of a slated school closure.²⁷³

E. 6,480,540 Reasons to Act and No Time to Wait

It took a national education funding crisis to uncover a procedural barrier to relief for families seeking injunctive action for an alleged IDEA violation in the face of a looming school closing.²⁷⁴ CPS’s historic decision to close forty-nine schools over a single summer²⁷⁵ posed serious challenges for ensuring compliance with the demanding IDEA.²⁷⁶ In the face of this pressure, however, CPS rose to the challenge—in doing so, it established the gold standard for dealing with mass school closings while simultaneously safeguarding students’ rights under the IDEA.²⁷⁷ The district went to great lengths to ensure that every student classified with a learning disability received personalized attention during the school transition, from reaching out to each family to discuss the transition and hosting meet-and-greets with new teachers to replicating students’ prior classrooms in the new schools.²⁷⁸ No step was too minor to ensure the smoothest possible transition for the students.²⁷⁹

268. See *supra* Section III.A.

269. See *supra* Section III.B.

270. See *supra* Section III.C.

271. See *supra* Section III.D.

272. See, e.g., *Barron ex rel. D.B. v. S.D. Bd. of Regents*, 655 F.3d 787, 792 (8th Cir. 2011) (waiving exhaustion because of the hearing officer’s inability to issue an adequate remedy); *N.S. ex rel. J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112-15 (2d Cir. 2004) (waiving administrative exhaustion when exhaustion is not supported by its underlying rationales).

273. See *supra* Sections III.A-D.

274. See *supra* Section II.B.

275. See *supra* note 2 and accompanying text.

276. See *supra* Section II.B.

277. See *supra* notes 146-52 and accompanying text (describing the comprehensive steps taken by CPS during the school closings and transitions).

278. See *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *10 (N.D. Ill. Aug. 15, 2013) (“For example, all diverse learners from the closing schools are being asked to prepare written and pictorial presentations about

While the *Swan* court found that CPS's comprehensive actions to comply with the IDEA made the motion for a preliminary injunction unlikely to prevail on the merits,²⁸⁰ the standard for school transitions set by CPS may be unreachable for many districts. Factors such as the number of students with disabilities affected by the move or the amount of resources dedicated specifically to IDEA compliance may impact a district's ability to ensure complete compliance.²⁸¹ While the parents would likely not have won on the merits of the claim in the CPS case, the presence of a future meritorious IDEA claim in the context of another school closing would currently be single-handedly rejected for want of administrative exhaustion.²⁸²

The CPS case exposes the determinative role that administrative exhaustion plays in a child's right to have his or her IDEA claim heard by a body with the authority to take remedial measures in a time-conscious manner.²⁸³ The time to take corrective action is now—before a meritorious IDEA claim is summarily

themselves to be shared with their new teachers at their receiving schools. Over the summer, receiving schools are scheduling a variety of events to introduce parents of diverse learners to the school, administrators and staff, such as tours, 'meet-and-greets,' and information sessions with case managers. For students in cluster programs, CPS has taken photos of the closing school classrooms and is trying to replicate them as much as possible in the receiving school to aid in the transition. Additionally, schools receiving students in cluster programs are preparing social stories with pictures of the school and classrooms in a story book format to provide to transitioning students." (internal citations omitted)).

279. See *supra* note 152 and accompanying text (noting that the district went so far as to match the color of the computer cords in the new classrooms with those in the closing schools).

280. See *Swan*, 2013 WL 4401439, at *1 ("Finally, when the low likelihood of success on the merits is considered in conjunction with the potential harm that injunctive relief would cause by prolonging the period of uncertainty for the impacted students and their parents, causing additional instability for the administration and staff at the schools, and preventing those students who may want the opportunity to attend higher performing schools from doing so, the balancing of equities weighs against preliminary injunctive relief. For these and the other reasons[,] . . . Plaintiffs' motions for preliminary injunction are denied.").

281. See *id.* at *2 (stating that the parents-plaintiffs claimed that the expedited timeline to close the schools did not provide the district with adequate time for the district to allocate requisite resources to ensuring IDEA compliance for the thousands of impacted students classified as disabled).

282. See *supra* Section III.B ("The IDEA's Jurisdictional Dilemma: The 'Party Aggrieved' Requirement").

283. See *supra* Section II.B (describing how the court rejected the parents' claim for a preliminary injunction due in part to their failure to first exhaust the administrative remedies).

dismissed amidst a school closing. By addressing the jurisdictional-giving language in the IDEA²⁸⁴ and the administrative-exhaustion requirement in the context of an imminent school closing,²⁸⁵ the current barrier to IDEA relief can be lifted.

1. *Eliminating Two Obstacles for IDEA Enforcement for Students with Disabilities*

The first aspect of the IDEA that merits modification is the jurisdictional-giving language. Only the “party aggrieved” can currently bring a civil action after the issuance of an administrative order,²⁸⁶ resulting in parents being unable to seek judicial enforcement of the hearing officer’s order.²⁸⁷ To remedy this disparity, jurisdiction should be provided to courts to hear claims brought by parents seeking IDEA enforcement when a district fails to comply with an administrative order.²⁸⁸ This remedy ensures that the merit of a hearing officer’s order has the backing of the courts and can be timely enforced.²⁸⁹ In the absence of this jurisdiction, the only remedy currently available for parents is to reengage the proven ineffective administrative process, all while the school closing and IDEA violation persist.²⁹⁰

The second necessary IDEA change addresses the mandatory administrative-exhaustion provision. When a school is slated to close in mere months, there is neither adequate time²⁹¹ nor the underlying rationales²⁹² to exhaust the IDEA administrative remedies prior to a school closing. The IDEA ought to be modified to expressly waive mandatory administrative exhaustion when a claim is brought for a temporary or preliminary injunction to prevent a school from closing.²⁹³ To help ensure that this waiver is not applied to contexts not intended, it should be limited to claims brought to rectify alleged

284. See *infra* Subsection III.E.1 (proposing a remedy to the “party aggrieved” language of the IDEA).

285. See *infra* Subsection III.E.1 (proposing a modification to the administrative-exhaustion requirement in a school-closing context).

286. The IDEA provides courts with jurisdiction only to hear a claim from the “party aggrieved.” See 20 U.S.C. § 1415(i)(2)(A) (2012).

287. See *supra* Section III.A.

288. See *supra* Section III.A.

289. See *supra* Section III.A.

290. See *supra* Section III.A.

291. See *supra* note 239 and accompanying text.

292. See *supra* Section III.C.

293. See *supra* Section II.C.

IDEA violations that result from a proposed or an initiated school closing.

Both of these changes are needed to ensure full IDEA compliance, particularly in the fast-paced environment of a looming school closing.²⁹⁴ These proposed changes would allow the parents to argue the merits of their IDEA-related preliminary injunction claim, rather than spending their and the court's time and resources first litigating whether a court has jurisdiction to enforce a hearing officer's order or whether exhaustion is appropriate.²⁹⁵ To be clear, neither of these modifications presumes that a parent will have a meritorious injunction claim, but only that his or her claim should not be predestined to fail. A uniform federal change that explicitly provides clear guidance for this narrow circumstance gives more certainty and protection to families seeking to ensure that a district complies with their students' IDEA protections during a school closing. To further buttress the appeal of making this change, it is important to briefly address the arguments against this proposal.

2. Three Critiques Addressed

The first critique of the proposal relates to its practical and potentially harmful effect on a district. Under these proposed modifications, a single student has the ability to bring a civil action for an alleged IDEA violation that may result in stopping an entire school from closing. This consequence may cost a district a substantial amount of money due to continuing building operations and maintenance,²⁹⁶ continuing transport of a shifting student

294. CPS, for example, initially announced in March 2013 that it would close fifty-four schools by August 2013. See James B. Kelleher & Mary Wisniewski, *Chicago Announces Mass Closing of Elementary Schools*, REUTERS (Mar. 21, 2013, 8:28 PM), <http://www.reuters.com/article/2013/03/22/us-usa-education-chicago-idUSBRE92K1C120130322>.

295. See *Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.*, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).

296. See CHI. PUB. SCHS., DRAFT EDUCATIONAL FACILITIES MASTER PLAN 9 (2013), available at http://cps.edu/About_CPS/Policies_and_guidelines/Documents/CPSDraftEducationalFacilitiesMasterPlan.pdf (stating that "[t]he average age of [Chicago Public School] buildings is 75 years old (i.e. built in 1938)" and that "[k]eeping up with the basic repair and maintenance of the current facilities footprint has been estimated at \$350 [m]illion per year").

population,²⁹⁷ and providing redundant educational programming and the cost of litigation.²⁹⁸ The cost savings for CPS's proposed school closings, for example, equated to \$43 million annually,²⁹⁹ though this number would not be representative of a single school closing or a small- to medium-sized district.³⁰⁰ No matter the district's size, requiring a school to remain open will harm the district financially and administratively.³⁰¹

There is no doubting the serious burdens that may result from the issuance of an injunction, but such factors are taken into consideration by the court when making its ruling.³⁰² To grant a preliminary injunction, the court must consider two factors aimed toward weighing these potential consequences: (1) whether the alleged harm to the movant without the injunction outweighs the potential harm that the preliminary injunction will inflict on the non-movant; and (2) whether the issuance of the preliminary injunction will disserve the public interest.³⁰³ It is true that a single student could temporarily halt a school closing; yet, this would only be done if the court first determines that the IDEA violation is so pervasive or severe that the financial and administrative harms should be temporarily subjugated.³⁰⁴ This safeguard is already in place to

297. *See id.* ("One challenge [that the Chicago Public Schools] face in attempting to fund improvements to bring our facilities up to the level we all wish for our students is a shift in the city's population. . . . This creates resource challenges for these schools and for our system as a whole.").

298. *See id.* at 37 ("Given limited financial resources, [Chicago Public Schools] cannot provide new programs in every school impacted by a closure.").

299. *See id.* at 36 (noting that the school closings and other cost-saving measures would result in an "operating cost savings of \$43 million annually").

300. *See id.* at 8 ("Chicago Public Schools ranks as the third largest school district in the nation with 403,461 students and 681 schools operating in 743 buildings. The District is made up of 515 Elementary Schools, 13 Middle Schools, and 153 High Schools.").

301. The main driving force behind school closings is typically financial strains. *See supra* Section I.A.

302. *See supra* note 136 and accompanying text.

303. *See supra* note 136 and accompanying text.

304. *See* *Swan v. Bd. of Educ.*, Nos. 13 C 3623-24, 2013 WL 4401439, at *28-29 (N.D. Ill. Aug. 15, 2013) ("In the balancing phase, Plaintiffs must demonstrate that the harm they will suffer without an injunction outweighs any harm that may be suffered by Defendants or third-parties (the 'public interest') if the injunction is granted. The [c]ourt employs a sliding scale approach: '[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor, the less likely he is to win, the more need it weigh in his favor.' Here, because Plaintiffs are not likely to succeed on the merits based on the evidence they have presented at this stage in the two cases, they must demonstrate great harm in the

ensure that only the most extreme cases result in an injunction.³⁰⁵ Not permitting a single student to bring an action to require IDEA compliance undermines the importance of the IDEA and presupposes that financial concerns will always trump the educational rights of students with disabilities.

A second criticism of creating this exception to mandatory administrative exhaustion is the frequently proffered slippery-slope argument.³⁰⁶ Enumerating an additional exception to mandatory IDEA exhaustion will lead courts to open the floodgates to finding further exceptions, leaving the process ultimately without the practical force intended. This type of slippery-slope argument is frequently made as a reason to resist extending a legal principle.³⁰⁷ Yet, its underlying logic is not applicable to making this narrowly created change to the IDEA.³⁰⁸ Providing courts with jurisdiction to hear a dispute related to the administrative hearing from either party, rather than just the party aggrieved, is simply unsusceptible to further extension. Moreover, the proposed change to the administrative-exhaustion requirement only applies in the specific circumstance of a claim seeking a preliminary injunction due to an alleged IDEA violation to temporarily prevent a school closing. This exception is

absence of an injunction. But Plaintiffs have not provided the [c]ourt with persuasive evidence that the harm they will suffer without an injunction is greater than the harm others will suffer, including other students, if an injunction was granted. . . . Weighing the two sides, the [c]ourt finds that the harm to Defendants and third-parties, including other students, if the preliminary injunctions were granted, outweighs the harm, if any, that the individual Plaintiffs would experience in the absence of a preliminary injunction, particularly in light of the low likelihood that Plaintiffs would be successful on the merits of their claims based upon the current record.” (internal citations omitted) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008))).

305. See *supra* note 136 and accompanying text.

306. A slippery-slope argument “is the claim that we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow.” Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1029-30 (2003) (internal quotation marks omitted).

307. See, e.g., *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 521 (2012) (“The slippery slope argument, we note, is hardly novel or unique . . .”); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 n.16 (1999) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”) (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 169 (1990))).

308. See generally Volokh, *supra* note 306, at 1029 (noting that legal “thinkers such as Lincoln, Holmes, and Frankfurter have recognized [that] slippery slope objections can’t always be dispositive” because a legal change is “often a risk that we need to take”).

exceedingly narrowed to a unique circumstance, resulting in its underlying justifications being not easily transferable to diverging situations.

A third critique of the proposed two-part solution is that making both changes simply goes too far. Solely giving courts the power to enforce an administrative hearing officer's order is arguably sufficient to ensure IDEA compliance—alleviating the need to also modify the administrative-exhaustion requirement. The established administrative remedy process provides the opportunity for the hearing officer to efficiently remedy the dispute.³⁰⁹ Further, if the district fails to adhere to an order, then a parent can compel compliance by directly seeking court enforcement. This solution permits the use of the more streamlined administrative process while also providing the direct backing of the court. Consequently, there is no need to also grant an automatic waiver of the IDEA administrative-exhaustion process.

While providing this enforcement power would address the “party aggrieved” jurisdictional-giving language,³¹⁰ this step alone falls short of fully resolving the problem. There is generally an extremely limited time between when a district announces a school closing and when the school physically closes.³¹¹ This narrow time frame does not provide parents with sufficient time to first engage in the administrative-exhaustion process and then, once it becomes apparent that the district is not fully complying, seek court enforcement.³¹² The alleged IDEA harm can continue unchecked without the ability to seek a preliminary injunction.³¹³ A preliminary injunction first determines whether the alleged harm is so severe and likely to be meritorious that the closing procedures should be

309. See Clark, *supra* note 21, at 4 (“If successful, administrative review helps to avoid unnecessary judicial intervention by giving school officials the first opportunity to correct any procedural or substantive errors in its proposal to the parent”); see also Neil F. *ex rel.* Charlie F. v. Bd. of Educ., 98 F.3d 989, 992 (7th Cir. 1996) (stating that the administrative hearing process should be given the “first crack” to resolve the dispute).

310. See *supra* Section III.B.

311. See, e.g., Kelleher & Wisniewski, *supra* note 294 (noting that CPS initially announced in March 2013 that it would close fifty-four schools by August 2013); *supra* text accompanying note 236; Swan v. Bd. of Educ., Nos. 13 C 3623-24, 2013 WL 4401439, at *1 (N.D. Ill. Aug. 15, 2013).

312. This process can be even more elongated in states that chose the two-tiered administrative review system. See *supra* note 73 and accompanying text.

313. See *supra* note 130 and accompanying text.

temporarily halted to address the IDEA violation.³¹⁴ Without a parent's ability to initially seek this preliminary court review in extreme cases, the time will have likely passed after exhausting the administrative remedies for a preliminary injunction review to be worthwhile; once the school has closed and the students and programs have been reassigned, they cannot easily be reversed.³¹⁵ Parents must have timely access to this essential form of relief before seeking a preliminary injunction becomes simply impracticable.³¹⁶

CONCLUSION

Just as there is no time to waste for parents attempting to halt an imminent school closing because of an IDEA violation,³¹⁷ there is similarly no time to spare to make these needed changes to the IDEA. With the rising prevalence of school closings across the United States,³¹⁸ there is an increasing threat that students with disabilities will be denied the protections and services provided to them under the IDEA.³¹⁹ Parents seeking to ensure IDEA compliance currently cannot timely seek a preliminary injunction to delay a school closing³²⁰ or get a court to force a district to fulfill a hearing officer's order.³²¹ The existing IDEA relies on a dangerous assumption that a hearing officer has the power to issue an adequate remedy and that such an order will be enforced in a timely manner.³²²

Much can be gleaned from collectively considering the aspects used by courts to apply or not apply mandatory IDEA administrative exhaustion.³²³ Requiring exhaustion of administrative remedies is not

314. See *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1083 (C.D. Ill. 2001).

315. See *Barron ex rel. D.B. v. S.D. Bd. of Regents*, 655 F.3d 787, 793 (8th Cir. 2011) (“[A]s a practical matter, it may be more than improbable that a hearing officer could ultimately enforce an order to the [district] to reverse its policy of cutting programs at the school’s physical location and out-sourcing services to home school districts.” (internal quotation marks omitted)).

316. See *id.* (stating that once a school program is eliminated, the administrative officer is unlikely to have the ability to reverse the district’s action despite an IDEA violation).

317. See generally *Kelleher & Wisniewski*, *supra* note 294 (noting that CPS initially announced in March 2013 that it would close fifty-four schools by August 2013).

318. See *supra* Section I.A.

319. See *supra* note 65 and accompanying text.

320. See *supra* Section II.C.

321. See *supra* Section III.B.

322. See *supra* Sections III.A-B.

323. See *supra* Sections II.C-D.

appropriate when this collective view is applied to instances of seeking a preliminary injunction to temporarily halt an imminent school closing due to an alleged IDEA violation.³²⁴ The case may be that no claim will ever be strong enough to obtain a preliminary injunction in this context, but courts are artificially making this presupposition a reality.³²⁵ Congress is expected to reauthorize the IDEA,³²⁶ which presents an ideal opportunity for it to remedy the current administrative-exhaustion barrier by making two changes: (1) provide courts with the jurisdiction to hear disputes from either party stemming from an IDEA administrative hearing; and (2) waive mandatory administrative exhaustion for civil cases seeking a preliminary injunction to temporarily prevent an imminent school closing due to a related IDEA violation.³²⁷ These two changes will help ensure that future actions for a preliminary injunction are not summarily dismissed for want of administrative exhaustion, but, rather, are adjudicated on the underlying merits of the claim.³²⁸ The time is now to take these steps to ensure that every student covered by the IDEA gets the required protection if—and, for many students in the United States, when—their school is slated to close.

324. See *supra* Sections III.A-D.

325. See *supra* Section II.D.

326. See generally Alyson Klein, *Education Laws Overdue for Renewal Languish in Congress*, EDUC. WK. (Jan. 14, 2014), http://www.edweek.org/ew/articles/2014/01/15/17congress_ep.h33.html.

327. See *supra* Subsection III.E.1.

328. See *supra* Subsection III.E.1.